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No. 04-582

IN THE

Supreme Court of the United States

RUI ONE CORPORATION,

Petitioner,

v.

CITY OF BERKELEY, ET AL.,

Respondents.

On Petition for a Writ Of Certiorari to the United States Court Of Appeals for the Ninth Circuit

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

RUI respectfully files this reply to the brief in opposition filed by Respondent City of Berkeley ("Berkeley"). Berkeley's arguments should be rejected. This Court should grant review to address the important and nationally significant constitutional questions presented. *See* Brief of Amici Curiae Chamber of Commerce of the United States of America, National Federation of Independent Business Legal Foundation, The National Restaurant Association, The California Restaurant Association, The Washington Restaurant Association, and The Original Fisherman's Wharf Restaurant Association In Support of Petitioner ("Chamber Brief"); Brief of Washington Legal Foundation as Amicus Curiae In Support of Petitioner ("WLF Brief"); Brief of Amicus Curiae Pacific Legal Foundation In Support of Petitioner.

Berkeley principally argues that this is not a "class of one" case because RUI is not the only business subject to the challenged Amendment to Berkeley's Living Wage Ordinance ("Amendment"). Even if "class of one" claims were dependent on there being literally only one entity or individual in the class being discriminated against, Berkeley's own opposition unwittingly demonstrates that the challenged Amendment, as applied in this case, satisfies this artificial limitation. But this Court's decision in *Village of Willowbrook* explicitly rejects the suggestion that a "class of one" claim depends on there being literally only a single entity or individual subject to discriminatory treatment by the government. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 n.* (2000) (per curiam).

Moreover, Berkeley's argument that there is not enough evidence of improper motive is baseless, as Judge Bybee demonstrated in his dissent. There is significant evidence in the record that Berkeley's passage of the narrowly targeted Amendment was improperly motivated by a desire to promote the organizing efforts of the Hotel Employees & Restaurant Employees Union Local 2850 (the "Union"), which

the panel majority blithely dismissed as "'entirely irrelevant for constitutional purposes.'" Pet. App. 30a. *See* Chamber Brief at 3-5, 7-14.

Berkeley tries to minimize the significance of the circuit split articulated by Judge Posner regarding the standard of proof and the relevance of improper legislative motive in "class of one" cases by addressing only cases in which such claims "have been rejected," purportedly "on their facts." Opp. 12. However, Berkeley never explains how these supposed factual differences account for the different standards applied by different Circuits in the wake of *Village of Willowbrook*. There is, in fact, no accounting for this divergence other than that the Circuits are applying different legal standards. This conflict in the lower courts warrants review by this Court.

Finally, the Ninth Circuit's unduly expansive interpretation of the police powers of Berkeley and other municipalities with respect to their contracting parties cannot be reconciled with the Contract Clause jurisprudence of this Court and other courts and threatens the wholesale abrogation of the contract rights of individual businesses and individuals by municipalities. *See, e.g.*, WLF Brief at 11-14. Simply because a municipality possesses police powers does not justify the unilateral rewriting of its own contracts with third parties. This issue also warrants review by this Court.

I. Plenary Review Of The Panel Majority's Equal Protection Ruling Is Warranted.

Berkeley's principal response to the "class of one" equal protection issue raised in RUI's Petition is as follows: no "class of one" issue exists here because Berkeley's challenged Amendment applies to more businesses than just RUI. *See* Opp. 1-6.

1. Berkeley's own opposition unwittingly belies its assertion that RUI was not the only business to which the Amendment applied for purposes of RUI's equal protection challenge. *Id.* After opening with the dubious assertion that

the Amendment applied to maybe up to "ten" businesses simply because the City mailed out notices to that number of businesses "during the pendency of the legislative process leading to adoption of the challenged amendment," Berkeley is only able to identify "two" other businesses to which the Amendment purportedly could have applied. *Id.* at 1-2 and n.1. Berkeley then tellingly admits that these "two businesses" are *exempt* from the Living Wage Ordinance's ("LWO") requirements because they entered into "collective bargaining agreements" with their employees, *i.e.*, succumbed to Berkeley and the Union's pressure to become union shops. *Id.* Calling RUI a "scofflaw" and "law breaker" for exercising its right to challenge the constitutionality of the Amendment does not change the fact that the Amendment in its practical operation singles out RUI — the only entity against which the City has attempted to enforce its Amendment to the LWO.[1] *Id.* at 3. Doing so does not alter the ample record evidence that clearly demonstrates that the Amendment in effect applies only to RUI. *See, e.g.*, Pet. App. 40a-41a, 53a.

There is no dispute that the Amendment to the LWO is so narrowly drawn as to apply only to a non-union business of a certain size with a certain number of employees in a small, specified geographic area (regardless of whether the collective bargaining agreement sets wages below LWO-mandated levels, as does the Radisson agreement), and it is not contested that only one business fits that bill. Even the panel majority below addressed and ruled upon the merits of RUI's "'class of one' equal protection claim" (albeit erroneously). Pet. App. 31a-32a. It also is not contested that the Amendment applies to existing leases in a retroactive fash-

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[1] There is no basis for Berkeley's use of such pejoratives. Consistent with the district court's order and a stipulation of the parties, RUI has been tracking and escrowing the funds needed to satisfy the Amendment's requirements should the Amendment finally be determined to be constitutional.

ion, unlike the LWO that applies only prospectively to new or amended municipal contracts.

Moreover, Berkeley's contention appears to rest on the fundamental misconception that a "class of one" equal protection claim exists only when a *single* entity is being targeted by the government. *See, e.g.*, Opp. 11 ("Most cases involving a class of one claim involve a claim that a law was invidiously enforced against a *single* wrongdoer.") (emphasis added). This Court has categorically rejected such an unduly constricted approach to equal protection jurisprudence, and has explained that "class of one" is simply a term of art. *See Village of Willowbrook*, 528 U.S. at 564 n.* ("We note that the complaint in this case could be read to allege a class of five. . . . Whether the complaint alleges a class of one or of five is of no consequence. . . .").

2. Because Berkeley's Amendment singles out RUI in its practical operation, it makes little sense to assert, as does Berkeley, that the split Ninth Circuit panel below was simply "closely follow[ing] this Court's own precedent" because the panel majority's opinion quoted – out of context – two words ("virtually unreviewable") from this Court's decision in *FCC v. Beach Cmmunications, Inc.*, 508 U.S. 307, 316 (1993). Opp. 4. This Court did state that legislatures have "virtually unreviewable" discretion "to approach a perceived problem incrementally," but it did so only in the context of a law of *general applicability*, where the ordinary operation of the political process provides some measure of protection against arbitrary and unreasonable impositions by the state upon individual persons and businesses. *See FCC v. Beach Communications*, 508 U.S. at 309 (considering a challenge to an Act of Congress that treated all "facilities that serve separately owned and managed buildings" differently than all facilities "that serve one or more buildings under common ownership or management"). Indeed, as RUI explained in its Petition without contradiction by Berkeley, every equal protection decision of this Court that has upheld a challenged law under rational basis scrutiny dealt with laws of *general applicability*, rather than the kind of narrowly tailored singling-out of

one business for discriminatory treatment effectuated by Berkeley's challenged Amendment. Pet. 18-19.

3. Berkeley does not confine its attempts to dodge the post-*Village of Willowbrook* circuit split described in RUI's Petition to its portrayal of this case as not involving a "class of one" claim. Instead, it also contends that there is "no" record evidence of potentially improper legislative motives that should be considered. Opp. 6. That contention is even more inaccurate than Berkeley's statement that "no judges of the Ninth Circuit voted to hear this matter en banc." Opp. 13; *but see* Pet. App. 87a ("Judge Bybee votes to grant the petition for panel rehearing and petition for rehearing en banc.").

Judge Bybee aptly summarized much of the record evidence of Berkeley's having enacted its challenged Amendment at the urging of the Union to pressure Marina businesses to become union shops. *See* Pet. App. 37a-41a. *See also* Chamber Brief at 3-5, 7-14. Just because Judge Bybee opted to do so in the context of his Contract Clause analysis does not mean that this factual evidence somehow is immaterial to RUI's "class of one" equal protection claim. It is significant that even the panel majority acknowledged that Judge Bybee "cite[d] additional facts" "to establish a supposed nefarious motive on behalf of" Berkeley. Pet. App. 12a, n.7.

It is hardly a coincidence that the challenged Amendment "was adopted two months after the union asked that the Living Wage ordinance be amended to apply to Marina businesses immediately," Opp. 7, that the Amendment to the LWO permits union shops to set wages below the LWO-mandated minimum, that the Amendment applies to only one entity in the City and the only restaurant in the Marina that is non-union, or that "[t]he Union in its request to intervene [in the district court proceedings] admitted that it had 'lobbied for the passage of the Ordinance, including its amendment to ensure its immediate implementation by the businesses on the publicly-owned marina such as Plaintiff's Skates Restaurant.'" Chamber Brief at 4-5 (*quoting* Memorandum in Sup-

port of Motion to Intervene, filed November 13, 2000, *RUI One v. Berkeley* (N.D. Cal. Case No. 00-3878SI), at 2); *see also id.* at 3-5 & n.2 (accurately complementing the description in Judge Bybee's dissent and in RUI's Petition of the record evidence of improper motivation on Berkeley's part in targeting RUI with its Union-driven special-interest legislation). Further evidence of Berkeley's improper motive exists in the record. *See, e.g.*, ER 116, 118-120, 126-29, 380-81, 383-85.

Of course, this Court need not determine whether enough record evidence exists to render the district court's *sua sponte* grant of summary judgment to Berkeley erroneous because the Ninth Circuit panel majority repeatedly held that any such evidence would be irrelevant as a matter of law to RUI's equal protection claim. *See, e.g.*, Pet. App. 12a-13a, n.7 (stating that the "additional facts" "introduced" by "the dissent" "to establish a supposed nefarious motive on behalf of the City Council" "are *wholly irrelevant*, . . . as our analysis of the constitutionality of an ordinance must proceed from the text of the ordinance, not the alleged motives behind it") (emphasis added) (citations omitted); Pet. App. 30a (stating that "'it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature'") (citation omitted).

4. Such a holding aligns the Ninth Circuit with some decisions of the Second Circuit, but against at least the Fifth, Seventh, Tenth, and Eleventh Circuits, insofar as the relevance of improper motive to "class of one" equal protection claims is concerned. Pet. 14-16 (quoting Judge Posner's description of this circuit split).

Berkeley's only real response to this circuit split consists of a thoroughly underwhelming attempt to distinguish "on their facts" only a small subset of the cases cited by Judge Posner – and only those cases in which the equal protection claim was rejected. Opp. 12-13. Yet, Berkeley never explains how these purported factual differences amongst the handful of cases it cites account for the different standards

that have been applied by different Circuits in the wake of *Village of Willowbrook*.

Furthermore, Berkeley never addresses the conflict between the Ninth and Seventh Circuits over whether the availability, or the extent of judicial scrutiny, of a "class of one" equal protection claim depends upon the claimant's "vulnerability." *See* Pet. 16-18 (citing cases).

II. The Panel Majority's Flawed Contract Clause Ruling Also Warrants This Court's Plenary Review.

Berkeley seeks to evade review by arguing that this Court's decision in *General Motors Corp. v. Romein*, 503 U.S. 181 (1992), authorizes it to impose any law upon RUI as long as it does not directly abrogate an *explicit* contractual term, and that, regardless, any unilateral contractual changes are permitted by municipal police powers. Berkeley cites extensively the conclusions of the divided Ninth Circuit panel.

The majority below misapplied this Court's and other courts' precedents and gave Berkeley and other municipalities free rein unilaterally to rewrite their contracts. Review by this Court is necessary to protect individuals and individual businesses against such an unfettered exercise of municipal power and to protect the sanctity of municipal contracts. As the Washington Legal Foundation argued in its amicus brief, "the issue here is whether [Berkeley's] police powers permit [it] to adopt an ordinance imposing vastly higher wage scales on a single employer, particularly when, as here, the city's hook for imposing the ordinance is that it has an existing contractual relationship with the employer yet it failed to seek the higher wages as part of the contractual bargaining process." WLF Brief at 5.

Berkeley misconstrues this Court's decision in *Romein* to require an identical match between the literal terms of the contract and the new law. However, *Romein* rejects such a requirement, and recognizes that "express or implied" terms

can be unconstitutionally impaired. *Romein*, 503 U.S. at 188. That nothing in the lease specifically refers to "living wages" or "living wage ordinances" per se is not dispositive. Pet. App. 6a-7a.

Berkeley goes further and contends that because "no provision of RUI's lease was *affected* by the Marina Amendment," it is free to apply the Amendment to a single business such as RUI. Opp. 15 (emphasis added). Berkeley simply ignores the fact that the Amendment "affect[s]" a number of provisions of the lease.[2] More importantly, the Amendment impairs an express or implied right "so central to the bargained-for exchange between the parties," *Romein*, 503 U.S. at 188-89: the rent and other obligations assumed by RUI in exchange for the right to occupy and enjoy the "unique location and amenities" of the property. This right – which Berkeley cited and relied upon in negotiating RUI's rent obligation – is *precisely* the right cited by Berkeley in support of the *new* obligation imposed on RUI through the Amendment. ER 404, 108; Pet. App. 29a, 30a, 61a, 81a.

Unlike the law at issue in *Romein*, Berkeley's Amendment is *not* a law of general applicability. *Compare Romein*, 503 U.S. at 183-84 (challenging state law provisions that governed a comprehensive, *statewide* workers' compensation system). The Amendment is precisely the type of "special interest" legislation targeting a single entity for discriminatory treatment that warrants more exacting scrutiny under the Contract Clause. *See, e.g.*, Pet. 22-23 (citing cases).

Review by this Court is essential to prevent Berkeley and other municipalities from using the Ninth Circuit's split decision, combined with broad invocations of their police power, to authorize the wholesale abrogation of contract rights. Berkeley "cannot avoid Contract Clause analysis merely by

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[2] The lease expressly references RUI's obligation to "maintain adequate personnel," Pet. App. 62a, "employ its best judgment, efforts and abilities" to maximize profits and enhance the Berkeley Marina, *id.* at 13a, and charge "reasonable" rates consistent with charges for similar merchandise or services in this area. *Id.*

establishing that the [challenged] ordinance is an otherwise legitimate exercise of police power." *Southern Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 893 (9th Cir. 2003).

Finally, Berkeley's suggestion that the Ninth Circuit panel majority's decision turned on issues of "California contract law" is bereft of merit. Opp. 16. As this Court has explained, "[t]he question whether a contract was made is a federal question for purposes of Contract Clause analysis . . . ." *Romein*, 503 U.S. at 187 (quoting *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100 (1938))." Pet. App. 42a-43a. The federal issues presented by RUI's Contract Clause claim are "whether there is a contractual relationship, whether a change in law impairs that contractual relationship, . . . whether the impairment is substantial," *Romein*, 503 U.S. at 186, and whether the impairment "is reasonable and necessary to serve an important public purpose." *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977).

This Court has drawn the important distinction between "generally applicable rule[s] of conduct," *Exxon Corp. v. Eagerton*, 462 U.S. 176, 191-92 (1983), that remedy "broad, generalized economic or social problem[s]," *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 250 (1978), and laws that have "a very narrow focus" and are "aimed at specific" parties. *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 412 n.13 (1983). The Amendment here is in the latter category.

CONCLUSION

This Court should grant plenary review of the Ninth Circuit's divided ruling in this case.

Respectfully submitted.

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